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No. 03-1116 and No. 03-1120

Supreme Court, U.S.
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In The
Supreme Court of the United States

JENNIFER M. GRANHOLM, ET AL.,

Petitioners,

v.

ELEANOR HEALD, ET AL.,

Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Petitioner,

v.

ELEANOR HEALD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF MICHIGAN ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, COMMITTEE FOR A CONSTRUCTIVE TOMORROW, AMERICAN TRAUMA SOCIETY, KIDS FIRST COALITION, TRAFFIC SAFETY ASSOCIATION OF MACOMB COUNTY, TRAFFIC SAFETY ASSOCIATION OF MICHIGAN, INC., NEIGHBORHOOD ACTIVISTS INTER-LINKED EMPOWERMENT MOVEMENT, AMERICAN VALUES, CONCERNED WOMEN FOR AMERICA, EAGLE FORUM, SIXTY PLUS, AND NATIONAL ASSOCIATION OF EVANGELISTS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In its Order of May 24, 2004, this Court granted certiorari to consider the following question:

> Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so, violate the dormant Commerce Clause in light of Sec. 2 of the Twenty-first Amendment?

PARTIES TO THE PROCEEDING

The Governor, the Attorney General, and the Chairperson of the Liquor Control Commission of the State of Michigan ("Michigan" or "State") were defendants-appellees below and are petitioners in No. 03-1116. The Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of Michigan beer and wine wholesalers, was an intervening defendant-appellee below and is a petitioner in No. 03-1120.

Respondents in both No. 03-1116 and No. 03-1120 were plaintiffs-appellants below and are individuals Eleanor Heald; Ray Heald; John Arundel; Karen Brown; Richard Brown; Bonnie McMinn; Gregory Stein; Michelle Morlan; William Horwath; Margaret Christina; Robert Christina; Trisha Hopkins; Jim Hopkins; and winery Domaine Alfred, Inc.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* believe this case to be of tremendous importance to the welfare of persons under the age of 21 ("minors"), because the relief requested by Respondents would greatly increase the access by minors to alcohol, which already is at crisis level, and would render state alcohol regulation unenforceable. The attendant increase in consumption of alcohol by minors would result in a corresponding increase in deaths, injuries, and other alcohol related problems to minors, their families and their victims.

The Michigan Association of Secondary School Principals is committed to the improvement of secondary education (5th through 12th grades) in the State of Michigan, and has worked with the Governor's office, the Michigan Legislature, and the Michigan Department of Education to improve education, identify obstacles, and resolve problems affecting students in middle and high schools.

The Committee for a Constructive Tomorrow is a national non-profit corporation with 40,000 supporters and is charged with promoting socially responsible consumer public policies.

The American Trauma Society is a national non-profit association with 2,000 members created to save lives through improved trauma care and injury prevention.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* affirm that none of the *Amici* have a financial or commercial relationship with any of the parties to this case. This brief has been prepared solely by counsel for the *Amici*. No monetary contributions to the preparation and submission of this brief have been made by any person or entity other than the *Amici*, their members, or their counsel.

The Traffic Safety Association of Macomb County, Michigan, seeks to address significant issues related to highway safety, to reduce deaths, injuries, and property losses due to traffic collisions.

The Traffic Safety Association of Michigan, Inc. is a state-wide, non-profit corporation dedicated to providing traffic safety education and information for Michigan motorists and citizens.

The Neighborhood Activists Inter-Linked Empowerment Movement is a statewide Arizona non-profit organization, with 30,000 supporters dedicated to providing the public with tools to protect their neighborhoods and resolve neighborhood issues.

The Kids First Coalition is a grassroots organization of parents, grandparents, and future parents dedicated to advancing pro-child and pro-family policies and educating the country on the needs of children.

American Values is a non-profit national organization that works to educate public policy makers on issues affecting the welfare of families, which include protecting children from ready access to alcohol.

The Concerned Women for America is a national non-profit, non-partisan organization charged with promoting public policies to benefit women and families.

Eagle Forum is a national women's organization that promotes pro-family public policies.

Sixty Plus is a non-partisan national seniors' group that advocates on issues affecting the health and welfare of seniors.

National Association of Evangelicals is a non-profit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 45,000 local churches from 51 different denominations.

These diverse organizations have come together as *Amici* to oppose the efforts of Respondents to invalidate state statutes regulating the direct shipping of alcohol, which would cause a major increase in the number of alcohol-related traffic fatalities, injuries, assaults, and other crimes, especially among our youths.

SUMMARY OF ARGUMENT

Section 2 of the Twenty-first Amendment to the United States Constitution grants the states sweeping authority to regulate alcohol trafficking in recognition of states' historical police powers, the need for state-based alcohol regulation to address local issues and concerns, and the need for an effective means of enforcement of such regulations.

Fundamental alcohol regulation requires control over what types of alcoholic products will be sold; who will be permitted to sell and to buy alcohol; and how to ensure accountability for such sales. Michigan and most other states do not permit sales from out-of-state sources to be delivered directly to in-state purchasers because no feasible and practical enforcement mechanism can provide fundamental control over such sales.

All 50 states prohibit sales of alcohol to minors. If the states cannot control direct shipping, the states cannot protect against illegal sales to minors.

Pointing to a single element of a complex regulatory system that superficially appears to grant in-state wineries a "preference" of local delivery not granted to out-of-state wineries, Respondents seek to eliminate statutes prohibiting direct shipping.

In doing so, Respondents ignore the critical differences between in-state and out-of-state wineries. The state imposes a heavy burden of licensing, regulation, and enforcement on in-state wineries, and can impose serious penalties for non-compliance, including license revocation. The same level of regulation and enforcement cannot realistically be imposed on out-of-state wineries.

Moreover, the claim of disparate treatment of in-state and out-of-state wineries is a ruse. Respondents do not ask for the in-state "preference" to be struck down; their sole purpose is to eliminate state regulation of shipments of alcohol from out-of-state.

Also of concern are the ramifications of the Court's decision beyond the confines of the case. Although the certified question mentions only wineries, striking the prohibition against direct shipping would permit direct shipping from not only the 3,000 United States wineries, but also the thousands of other wineries worldwide. Moreover, producers of beer and spirits also would be able to ship their products, as would hundreds of thousands of out-of-state retailers.

It is this threat of deregulation, the concomitant expansion of alcohol access by underage persons, and the catastrophic consequences of this increased access that join the diverse *Amici* in this brief.

ARGUMENT

THE IMPORTATION AND SALE OF ALCOHOLIC BEVERAGES MUST BE CLOSELY REGULATED BY THE STATES TO PROTECT AGAINST UNFETTERED ACCESS TO ALCOHOL BY MINORS.

A. Alcohol Trafficking Historically Has Been Heavily Regulated By The States.

Because of its potential for abuse, the importance of an enforceable system of alcohol regulation has long been recognized. Trafficking in alcohol has been the subject of two Constitutional amendments,[2] as well as federal legislation clarifying the nearly absolute authority of the states over alcohol trafficking.[3] No other consumer product has received the same level of attention. As the Seventh Circuit noted in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied, sub nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001), a state may "control alcohol in ways that it cannot control cheese."

B. Preventing Underage Alcohol Access And Consumption Is The Public Policy Of All 50 States, And Is Fully Supported By The United States Government.

Particular concerns about the consequences of youth drinking resulted in the enactment of the National Minimum

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[2] U.S. Const. amend. XVIII prohibited all manufacture and sale of alcohol; the Twenty-first Amendment repealed the Eighteenth Amendment, but in doing so, through § 2, expressly placed authority to control alcohol with the states. A proposed § 3 to the Twenty-first Amendment would have provided dual jurisdiction over alcohol regulation with the federal government, but was defeated.

[3] Wilson Act, 27 U.S.C. § 121; Webb-Kenyon Act, 27 U.S.C. § 122.

Drinking Age Act[4] in 1984, which threatened the loss of certain federal funding, prompted all of the states that had not yet done so, to set a minimum age of 21 for drinking alcohol. This Act has been credited with saving more than 20,000 young lives in the 20 years since enactment.[5]

In spite of these gains, underage access to alcohol and the related loss of lives, injuries, and other societal costs resulting from underage drinking remain a serious problem. On July 21, 2004, the STOP Underage Drinking Act[6] was introduced in the House of Representatives.

Among the Congressional Findings of the Act are:

(1) Drinking alcohol under the age of 21 is illegal in each of the 50 States and the District of Columbia. Enforcement of current laws and regulations in States and communities, *such as minimum age drinking* laws, zero tolerance laws, and *laws and regulations which restrict availability of alcohol*, must supplement other efforts to reduce underage drinking.

(2) Data collected annually by the Department of Health and Human Services shows that alcohol is the most heavily used drug by children in the United States, and that –

(A) more youths consume alcoholic beverages than use tobacco products or illegal drugs;

[4] 23 U.S.C. § 158.

[5] Mothers Against Drunk Driving, http://www.madd.org/aboutus/0,1056,1986,00.html (last visited July 24, 2004).

[6] H.R. 4888, 108th Cong. (2004).

(B) by the end of the eighth grade, 45.6 percent of children have engaged in alcohol use, and by the end of high school, 76.6 percent have done so; and

(C) the annual societal cost of underage drinking is estimated at $53 to $58 billion.

(3) Data collected by the Department of Health and Human Services and the Department of Transportation indicate that alcohol use by youth has many negative consequences, such as immediate risk from acute impairment; traffic fatalities; violence; suicide; and unprotected sex.

(4) Research confirms that the harm caused by underage drinking lasts beyond the underage years. Compared to persons who wait until age 21 or older to start drinking, those who start to drink before age 14 are, as adults, four times more likely to become alcohol dependent; seven times more likely to be in a motor vehicle crash because of drinking; and more likely to suffer mental and physical damage from alcohol abuse.

(5) Alcohol abuse creates long-term risk developmentally and is associated with negative physical impacts on the brain.

(6) Research indicates that *adults greatly underestimate the extent of alcohol use by youths*, its negative consequences, and its use by their own children. The IOM report concluded that underage drinking cannot be successfully addressed by focusing on youth alone. Ultimately, adults are responsible for young people obtaining alcohol by selling, providing, or otherwise making it available to them.

* * *

(8) *A significant percentage of the total alcohol consumption in the United States each year is by underage youth. The Substance Abuse and Mental Health Services Administration reports that the percentage is over 11 percent.*

* * *

(14) College and university presidents have cited *alcohol abuse as the number one health problem* on college and university campuses.

(15) According to the National Institute on Alcohol Abuse and Alcoholism, two of five college students are binge drinkers; 1,400 college students die each year from alcohol-related injuries, a majority of which involve motor vehicle crashes; more than 70,000 students are victims of alcohol-related sexual assault; and 500,000 students are injured under the influence of alcohol each year.

* * *

(18) According to the Government Accounting Office ('GAO'), the Federal Government spends $1.8 billion annually to combat youth drug use and $71 million to prevent underage alcohol use. (emphasis added)

H.R. 4888, § 101 further provides that:

It is the sense of the Congress that:

(1) A multi-faceted effort is needed to more successfully address the problem of underage drinking in the United States. . . .

(2) States and communities, including colleges and universities, are encouraged to adopt comprehensive prevention approaches, including –

* * *

(C) consistent policy enforcement; and

(D) environmental changes that limit underage access to alcohol.

(3) Public health and consumer groups have played an important role in drawing the Nation's attention to the health crisis of underage drinking. Working at the Federal, State, and community levels, and motivated by grass-roots support, they have initiated effective prevention programs that have made significant progress in the battle against underage drinking.

Finally, H. R. 4888 requires the Secretary of Health and Human Services to "annually issue a 'report card' to accurately reflect the performance of each state in enacting, enforcing, and creating laws, regulations, and programs to prevent or reduce underage drinking."[7]

The measures upon which the states will be rated include:

(A) *The degree of strictness of the minimum drinking age laws* and dram shop liability statutes in each State.

(B) The number of compliance checks conducted within alcohol retail outlets measured against the number of total alcohol retail outlets in each State, and the results of such checks.

(C) Whether or not the State mandates or otherwise provides training on the proper selling and serving of alcohol for all sellers and servers of alcohol as a condition of employment.

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[7] H.R. 4888, § 202, 108th Cong. (2004).

(D) Whether or not the State *has policies and regulations with regard to Internet sales and home delivery of alcoholic beverages.*[8] (emphasis added)

Thus, it is apparent that although the Respondents may be naïve or disingenuous enough to assert that deregulation of alcohol shipping will have no impact on underage drinking, Congress is not.

C. Direct Shipping Of Alcohol Will Increase Minors' Access To Alcohol.

Respondents disparage the notion that directly shipping alcohol from out-of-state to private residences will increase underage drinking. Variously, Respondents have contended that no evidence exists that minors are purchasing alcohol from direct shippers; minors do not have the monetary resources or desire to buy costly, upscale wines; minors seeking to purchase alcohol will obtain the alcohol only from sources that provide them with immediate access; the ease with which minors can obtain access to alcohol from in-state party stores and bars make it unlikely that they will seek out alternative sources; and age verification by delivery personnel is sufficient to ensure that minors do not receive shipments of alcohol.

Real world experiences refute these claims.

[8] *Id.*

1. As local law enforcement efforts reduce the opportunities to obtain alcohol from in-state licensed retailers, minors will seek alternative ways to obtain alcohol.

Michigan, among other states, has substantially increased enforcement efforts to reduce in-state sales of alcohol to minors. Although the problem is far from being eliminated, significant reductions in such sales have been achieved. Michigan now requires alcohol management training for new licensees as a condition of licensing.[9] Underage drivers' licenses have been modified to make identification easier, most recently by issuing vertical licenses to minors, and horizontal licenses to those over 21, and by providing the date upon which the driver will turn 21.[10] Licenses now have holographic images and data strips to make forgery more difficult.

For obvious reasons, neither minors illegally purchasing alcohol nor the retailers selling to them self-report their crimes. Thus, the primary way to assess the effectiveness of deterrent measures in-state has been through controlled buy investigations ("stings") in which a minor under the supervision of law enforcement attempts to purchase alcohol. Other than these stings, illegal alcohol purchases and consumption typically come to light only when law enforcement officers are called to the site of a traffic crash or investigate rapes, assaults, and other alcohol related offenses.

[9] MCL 436.1906; 1979 AC, R. 436.1060.

[10] http://www.michigan.gov/sos/0,1607,7-127--70561--,00.html (last visited July 23, 2004).

Detecting illegal purchases made by a minor from an out-of-state seller over the internet, by phone, or through catalog sales, where the alcohol is then delivered to the minor's doorstep, is more difficult yet. The only reliable way to measure the ease of access is through stings involving minors placing orders to determine whether the sellers require proper age verification at the time of the orders and first determine whether delivery companies verify that the recipients are over 21.

Respondents have argued that only minors participating in the stings are purchasing alcohol from out-of-state, that no evidence exists outside of the stings. This argument is identical to the argument proffered by in-state retailers when in-state stings were first implemented. The fundamental flaw in this argument is that neither retailers nor minors voluntarily turn themselves in for prosecution following a sale. Absent decoy stings, sales to minors typically are identified only when the minor is involved in an alcohol related offense. Accordingly, direct evidence of sales to minors outside of stings is very limited. The best evidence that minors have easy access to alcohol from remote sellers continues to be the result of decoy stings.

A number of such stings have shown that it is all too easy for minors to purchase alcohol for direct shipment from out-of-state.

In mid-1999, the Michigan Attorney General and the Liquor Control Commission conducted a series of stings, which revealed that most alcohol sellers were far more concerned about the validity of the credit card number

than the age of the purchaser.[11] About one in three sites contacted agreed to sell alcohol to the minor purchaser with no more age verification than a "click" of the mouse. United Parcel Service personnel delivered the purchases without verifying the age of the minor recipient. Since that time, Michigan has intercepted and seized over a thousand bottles of illegally shipped wine, beer, and spirits. Nearly 2/3 of the shipments were from alcohol retailers, *not* wineries.[12]

In the fall of 2003, students enrolled in a Public Health class at the University of Tennessee teamed with the Knox County Sheriff's Department and the Knoxville chapter of Mothers Against Drunk Driving to determine whether alcohol could be obtained by a minor over the internet. The students successfully made and had delivered purchases of alcohol from out-of-state retailers without age verification.[13]

More recently, in Massachusetts, stings resulted in multiple sales and delivery of alcohol to underage buyers making their purchases over the internet.[14]

Where enforcement efforts are successfully reducing the number of sales to minors at in-state licensed establishments, it should be expected that a greater percentage of remote sellers would sell to minors than would in-state retailers.

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[11] http://www.ag.state.mi.us/press_release/archive/pr10163.htm (last visited July 25, 2004).

[12] *Id.*

[13] WBIR-TV (NBC), Knoxville, TN, reported on November 12, 2003.

[14] http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1241 (last visited 13, 20 July 23, 2004).

First, a remote sale does not involve a face-to-face transaction. In-state retailers approached by a minor to purchase alcohol have an opportunity to observe the purchaser directly, to assess nervousness and other mannerisms that indicate the person may not be of legal age to purchase, and to closely scrutinize a government-issued picture identification. Michigan requires "diligent inquiry" to verify age, which is defined as, "at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification which establishes the identity and age of the person."[15] This requirement simply cannot be met by a "click" of the mouse or a faxed (and easily altered) copy of a license.

Second, in-state licensed wineries and retailers risk their state liquor license – their very livelihood – if they sell to minors. Out-of-state wineries and retailers have little to lose, since, in the rare event that the illegal sale is identified, their licenses are not at risk and out-of-state prosecutions are exceptionally difficult and prohibitively costly to pursue.

No system for verification of age has been identified that can adequately protect against alcohol purchases by minors from out-of-state sellers.

2. Underage Buyers have incentive and financial resources to purchase alcohol for direct shipment.

Respondents have suggested that minors will not buy costly upscale wines. This premise presumes that minors

[15] MCL 436.1701(10)(b).

have little discretionary money and that they have no interest in fine wines. The first presumption is false and the second presumption is irrelevant.

The discretionary income of minors is not perceived as minimal by those who market to this demographic. Studies by Teen Research Unlimited, a market-research firm that focuses on the teen market, estimated that teens in the United States from ages 12 to 19 spent $175 billion in 2003.[16] The average high school teen spends $66.00 weekly.[17]

Moreover, the use of credit cards by teenagers has mushroomed. Approximately 1 in 5 teens ages 12 to 19 have and use a credit card.[18] Nearly 80% of teens ages 18 to 20 years have their own credit card.[19] Persons entering college are offered an average of 8 credit cards the first week of school.[20]

And teens do use their credit cards, often to their detriment. Undergraduate college students carry an average of three credit cards each,[21] and 20% of those

[16] http://www.teenresearch.com/PRview.cfm?edit_id=168 (last visited July 23, 2004).

[17] http://cardweb.com/cardlearn/faqs/2003/november/21.xcml (last visited July 17, 2004).

[18] Young Americans Center for Financial Education, http://www.yacenter.org/index.cfm?fuseAction=financialLiteracyStatistics (last visited July 17, 2004).

[19] http://cardweb.com/cardlearn/faqs/2002/sep/24.xcml (last visited July 17, 2004).

[20] Young Americans Center for Financial Education, http://www.yacenter.org/index.cfm?fuseAction=financialLiteracyStatistics (last visited July 17, 2004).

[21] Louisiana State University Agricultural Center, Youth Financial Literacy Statistics, http://www.lsu.edu (last visited July 17, 2004).

students who carry balances on their cards have debts of more than $10,000.[22] University administrators state that they lose more students to credit card debt than to academic failure.[23]

The second presumption, that minors have no interest in fine wines, is irrelevant, since wineries and retailers do not limit their offerings to high end wines for those with sophisticated palates. Although Respondents continue to characterize this case as limited to wine connoisseurs and enthusiasts seeking rare fine wines, however those are defined in fact, the statutes they seek to invalidate are not so limited. The alcohol controlled by the state's three-tier system include wine coolers, beer, rums, tequilas, flavored vodkas, and other similar products favored by young drinkers. 35% of all wine coolers sold in the United States are consumed by junior high, middle school, and high school students.[24] The ability to obtain these products without a face-to-face purchase is particularly attractive to the younger and more youthful appearing teens.

Respondents also have contended that wineries do not *market* to youthful drinkers. Again, this case is not exclusively about wineries. The statutes in question regulate beer and spirits sales as well. Moreover, even if the case were limited to wine, many wine sites either are directed at youth, or contain links to youth oriented wine sites.

[22] Virginia Credit Union League, citing statistics obtained from the American Bankruptcy Institute, the Federal Reserve, and the National Endowment for Financial Education, http://www.vacul.org/fin_lit/stats.htm (last visited July 17, 2004).

[23] http://www.louisiana.tomorrowsmoney.org/information.cfm/youth/eng (last visited July 23, 2004).

[24] www.wirthlin.com.

Sites such as Wine X Wired,[25] which features "Wine Bitch," "X-Rated Wines," "Winebrats," "G-Spot," "WineRave," and "Sex, Wine & Rock N' Roll" clearly are aimed toward youth.

One of the first studies to explore Internet marketing of alcohol and tobacco to minors was conducted by the Center for Media Education (CME):

> The study found that alcohol and tobacco companies are using the online media to advertise and promote their products, through a variety of marketing techniques that capitalize on the medium's strong and unique attraction for young people.[26]

In December 1998, the CME published an update to the original study.[27] This study examined 77 beer, wine, and spirits Internet sites, and concluded that 62% of the sites included elements appealing to youth. The study discussed the marketing techniques:

> The sites that appear to appeal to youth often strive to create a community of brand-loyal enthusiasts, a place where lonely teens can talk, find peers and support for risky activities like binge drinking. Known among marketers as relational advertising, this effort to build a relationship between the user and the product is the dominant trend in marketing on the Web and is already heavily exploited by the alcohol industry.

[25] www.winexwired.com/toc.htm (last visited July 24, 2004).

[26] *Alcohol and Tobacco on the Web: New Threats to Youth*, March 1997.

[27] *Alcohol Advertising Targeted at Youth on the Internet: An Update*, December 1998.

It is thus apparent that internet alcohol websites do market to teens, and teens have the ability and interest in purchasing online.

3. Minors are willing to purchase alcohol from direct shippers if their age is less likely to be verified and they are less likely to be caught, even if the purchase entails a slight delay until receipt.

Respondents also have contended that minors want immediate access to alcohol, and won't wait for shipment from a remote seller. The Wirthland Worldwide study of college students[28] conducted for Americans for Responsible Access for Alcohol[29] suggests otherwise, finding that 17,609 students in the survey reported having purchased beer, wine, or liquor over the internet, by toll-free phone order, or by mail-order catalog. Obviously, a delay in receiving the alcohol did not stop these sales. The Wirthland study also found that 80% of the students surveyed said their peers are likely to purchase alcohol online if no age verification is required.

Moreover, the delay between ordering and delivery of alcoholic products can be minimal. Most alcohol websites offer a variety of delivery options, ranging from UPS Ground to FedEx Preferred Overnight, the latter of which

[28] www.wirthlin.com.

[29] ARAA's members and supporters include, *inter alia*, the Virginia Attorney General, Students Against Destructive Decisions (SADD), the National Association of Governors' Highway Safety Representatives, the American Academy of Pediatrics, the Virginia Alcohol Control Board, the American Council of Alcoholism, and the National Transportation Safety Board.

guarantees delivery by 10:30 a.m. the morning following the order.[30]

Thus, a minor wishing to purchase a case of grain alcohol from Randall's Wines and Spirits (www.internet wines.com)[31] for a Friday "party punch" could order it on the preceding Monday for regular delivery, or he could wait to order it until late Thursday and still have it arrive on Friday morning by adding only $20 more to the shipment cost.

4. Common carrier delivery personnel do not properly verify the age of the person accepting shipments.

Respondents also suggest that the burden of age verification should be with delivery personnel who can be trained to properly validate age. The stings in Michigan, Tennessee, and Massachusetts showed that common carrier delivery personnel were *not* effective at verifying that the recipients of packages containing alcohol were at least 21 years old.

In the Michigan stings discussed previously, UPS delivered the illegal shipments without proper age verification of the recipients. The sting investigations by the

[30] See, *e.g.*, Prime Wines, http://www.primewines.com/content_shipping.asp ("Most orders are delivered within 48 hours of confirmation. . . . Express Delivery is available"), Internet Wines and Spirits, http://www.internetwines.com/shippingrates.html ("In most cases, in-stock items will ship same-day when ordered before 8:00 am central time. Overnight and 2nd Day orders placed after 8:00 am central time will be shipped the next business day.") (Both sites last visited July 24, 2004).

[31] www.internetwines.com (last visited July 24, 2004).

University of Tennessee[32] and the state of Massachusetts[33] also found that delivery personnel failed to verify age, even where the packages identified the contents as alcohol and had labels stating that age verification was necessary.

Common carrier delivery personnel are trained to deliver *packages* – that is the business of and source of revenue for the delivery company. Delivery personnel, whose mission is to deliver as many packages in as short a time as possible, are only hampered in achieving their goal by requirements of age verification.

The common carrier and its personnel make money from the delivery of packages, not from selling alcohol. Demanding that delivery personnel conduct ID checks is not an effective and reliable method of verifying age.

D. Alcohol Regulation Is Not Possible Without Enforcement Capability.

Enforcement efforts against out-of-state entities are prohibitively difficult and costly. If direct shipping is permitted, out-of-state sellers simply cannot be subject to the same standards and enforcement as in-state retailers.

In-state retailers and wineries are subject to rigorous investigation in order to become licensed, which requires, among other things, extensive disclosure of financial documents, on-site inspections of proposed license premises, and policy background checks.[34] Once licensed, they

[32] WBIR-TV (NBC), Knoxville, TN; reported on November 12, 2003.

[33] http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1241 (last visited July 23, 2004).

[34] MCL 436.1101, et seq.; 1979 AC, R. 436.1101-436.1531.

must comply with a multitude of statutory requirements and rules designed to protect the consuming public. Retailers bear the burden of ensuring that sales are not made to minors or intoxicated persons; that sales are made only during hours authorized by statute; that sales are not made in violation of local option laws; that only safe, approved products are sold; that spirit sales are made in accordance with state-mandated price controls; and that appropriate taxes are collected and remitted to the state.[35] Retailers are held responsible for improper or illegal sales with penalties ranging from fines to suspension or revocation of their liquor licenses.[36] Dram-shop laws place liability on retailers for injuries and deaths resulting from sales to minors or visibly intoxicated individuals.[37]

These stringent requirements protect consumers from unlawful sales by requiring that alcoholic beverages be sold and distributed to consumers only by persons who are responsible and can be held accountable. In-state retail licensees are accountable to and reachable by the State, because non-compliance with the law may subject them to fines, suspension, or revocation of their liquor licenses and even criminal prosecution.

A decoy sting on an in-state retailer is simple: The minor attempts to make a purchase with cash furnished by law enforcement and immediately is either sold or turned away. A decoy team can make many stops in a single outing.

[35] *Id.*

[36] MCL 436.1901, et seq.

[37] MCL 436.1801.

A decoy sting on an out-of-state retailer is more costly and time-consuming: The minor must have a credit card in his own name and must be present for delivery. Following such a sale and delivery, the actual seller must be identified for further enforcement effort.

Establishing the true identity of the seller from the Internet website name or assumed name is frequently difficult. The seller's website often provides few clues to the name of the seller or its location. As an example, the Internet site www.internetwines.com is operated by Randall's Wine & Spirits, and "Out of Africa" is the assumed name for S.A. Wines, Inc., a California company specializing in selling wines from Africa and South America. Further, once located, out-of-state sellers typically dispute jurisdiction, refuse service, or ignore communications sent to them. There is no state-issued license to fine or revoke, and the seller assumes little risk by selling in a manner that would never be permitted for in-state licensees.

Applying and enforcing the state's liquor laws "equally" on in-state and out-of-state wineries and retailers, so casually suggested by the Respondents as a panacea, is based on a superficial, simplistic, and flawed understanding of liquor control regulation and enforcement.

There is not a state in the union that could afford to fund regulation of the hundreds of thousands of out-of-state retailers and wineries the same way it regulates its in-state retailers and wineries.

E. The Ramifications Of The Court's Decision In This Case Extend Well Beyond Wine And Wineries.

Because wineries selling and shipping their own products are acting as retailers for their wines, little distinction exists between these wineries and retailers who want to ship alcoholic beverages produced by others. Literally hundreds of thousands of alcohol retailers in the United States are affected in the same way as the wineries by the direct shipping laws. Add to these the breweries, distilleries, and retailers from around the world, and the numbers become mind-boggling.

The burden placed on a state to apply the level of oversight, investigation, and enforcement it imposes on in-state wineries and retailers is impossible to impose on virtually an unlimited number of out-of-state alcohol sellers.

As the Court is well aware, laws and regulations are worthless without a real ability to enforce them. Permitting direct shipments would render Michigan's regulatory system unenforceable against all out-of-state sellers.

CONCLUSION

Alcohol regulation and control continues to be a necessary adjunct to alcohol sale and distribution, because alcohol *is* different from most other products and because of the damage that results from its overuse and abuse. Every state has committed to protection of our minors, yet minors will be placed at the greatest risk of injury if state laws prohibiting direct shipping are stricken.

Accordingly, *Amici* urge the Court to enforce states' rights under the Twenty-first Amendment to the Constitution, and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

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